No. 93-1637

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IN THE

Supreme Court of the United States

October Term, 1993

MEDICAL SOCIETY OF THE STATE OF NEW YORK and NATHANIEL H. SOLOMON,

Petitioners,

against

THOMAS SOBOL, as Commissioner of the Department of Education of the State of New York, DAVID AXELROD, as Commissioner of the Department of Health of the State of New York, EDWARD V. REGAN, as Comptroller of the State of New York, DALL W. FORSYTHE, as Director of the Budget of the State of New York, MARIO M. CUOMO, as Governor of the State of New York, and the BOARD OF REGENTS OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

G. OLIVER KOPPELL
Attorney General of the State of New York
Attorney for Respondents
The Capitol
Albany, NY 12224
(518) 473-0903

JERRY BOONE
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

Of Counsel

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THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
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Counterstatement of Questions Presented

1. Whether this Court should grant certiorari to review whether a New York statute imposing a $92 increase in the cost of physicians' registrations for 1991 impairs a property right created by prior legislation, when the court below assumed *arguendo* that a property right had been created and correctly concluded, relying on the precedents of this Court, that the impairment of that right effected by the challenged legislation was too minimal to rise to the level of an unconstitutional taking of property.

2. Whether this Court should grant certiorari to clarify whether the Contract Clause of the United States Constitution applies to implied contracts between a State and its citizens, when that issue has been resolved for more than sixty years and the court below, applying the precedents of this Court, correctly concluded that the New York statute assertedly creating contractual rights on behalf of petitioners instead did no more than express the general public policy of the State and did not establish any contractual obligations.

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Statement of the Case

The Statutory Scheme

A physician who is licensed to practice medicine in New York State must also register with the State Education De-

partment in order to practice in New York. NY Educ. Law § 6502(1) (McKinney 1985 & Supp 1993). The requirements for the registration of physicians in New York State are found in section 6524 of the Education Law. Until the 1990 change in the law that is the subject of this litigation, NY Educ. Law § 6524(8) provided for registration of all physicians triennially, with the first triennial period, applicable to all physicians, beginning on January 1, 1983, and the succeeding periods to begin January 1, 1986, January 1, 1989 and January 1, 1992. Prior to 1989, the total registration fee, payable triennially, was $220, consisting of three components: "a fee of one hundred twenty dollars for each triennial registration period commencing on and after January first, nineteen hundred eighty-three," NY Educ. Law § 6524(8) (McKinney 1985), to be "collected by the department of education and deposited to the professional medical conduct account," 1989 NY Laws, ch 43, § 61, which funds the state office of professional medical conduct; "an additional fee of ten dollars [to] be paid and deposited in the general fund for the purpose of offsetting any expenditures made pursuant to" NY Pub. Health Law § 230(15) (McKinney 1993), which provides for grants for the funding of physicians' committees designed "to confront and refer to treatment physicians who are thought to be suffering from alcoholism, drug abuse or mental illness," NY Educ. Law § 6524(9) (McKinney 1985); and "an additional fee of ninety dollars [to] be paid and deposited in the general fund for the purpose of increasing expenditures made pursuant to [NY Pub. Health Law § 230] in relation to the operation of the office of professional medical conduct within the department of health," NY Educ. Law § 6524(10) (McKinney 1985). The office of professional medical conduct carries out the administrative, investigatory and legal functions of the State Board of Professional Medical Conduct, NY Pub.

Health Law § 230(10) (McKinney 1993), which is responsible for dealing with "matters of professional misconduct" in the medical profession, NY Pub. Health Law § 230(1) (McKinney 1993). In 1989, Section 6524(9) of the Education Law was amended to increase the "additional fee" from $10 to $30, to be paid and deposited not into the "general fund" but rather "into the special-revenue fund entitled 'the professional medical conduct account,' " again for the purpose of offsetting expenditures made pursuant to Public Health Law § 230(15).

Section 278 of Chapter 190 of the New York Laws of 1990 amended Education Law § 6524(8) to raise the basic fee for each registration period from $120 to $210. The additional fees of $30 and $90 imposed by § 6524(9) and (10) respectively remained unchanged, except that the $90 fee is now to be "paid and deposited into the special revenue fund entitled 'the professional medical conduct account' for the purpose of increasing expenditures made pursuant to [NY Pub. Health Law § 230] in relation to the operation of the office of professional medical conduct within the department of health." 1990 NY Laws, ch 190, § 279. In addition, 1990 NY Laws, ch 190, § 280 provided that "the triennial registration period for licensed physicians set in accordance with [NY Educ. Law § 6524], which commenced January 1, 1989 and was to extend until December 31, 1991 shall extend until December 31, 1990 and the succeeding triennial registration period otherwise due to commence January 1, 1992 shall instead be a biennial registration period commencing January 1, 1991." Thus, as a result of the New York Laws of 1990, physicians went from having a $240 registration fee that covered a three-year period to having a $330 fee covering a two-year period. In addition, 1991, the first year of the first of these scheduled biennial registration periods, had been, before the change in the law, the last year of a triennial period that had commenced in 1989.

The Present Action

On December 28, 1990, plaintiffs-petitioners ("plaintiffs") Medical Society of the State of New York and Nathaniel H. Solomon commenced the present action in the New York Supreme Court, Albany County, challenging on constitutional grounds the change from a triennial to a biennial period, claiming that Section 280 "obliterates the third year of the three year period that physicians have already paid for," thus "nullif[ying] the certificates of registration that physicians have received" and instead requiring them to "re-register by January 1, 1991" and "pay the new, higher fee" by that time (24).[1] Plaintiffs challenged § 280 as, *inter alia*, a taking of "the property of physicians for public use without just compensation," in violation of the federal and state constitutions, in that it supposedly "obliterat[es] the third year of a valid three-year registration period." They also contended that § 280 is an unconstitutional impairment of "the obligations of the State's contracts with all licensed physicians who have, or who are entitled to have, registrations valid through the end of 1991" (37-38). Plaintiffs also asserted causes of action for "deprival of property without due process," "substantive due process," "equity and fairness," and "equal protection and legislative intent" (37-39). Defendants duly answered (41), and both sides moved for summary judgment (47, 102).

The Decisions Below

On April 10, 1992, the Supreme Court issued a decision granting plaintiffs' motion for summary judgment and denying defendants' motion (10). After concluding that "physicians have a constitutionally protected property interest in

[1]Parenthetical citations are to the Record on Appeal before the Appellate Division, Third Department.

their registrations," the Supreme Court found that § 280 took from physicians "one year of valid registration" for which they had already paid and "forced" them "to pay twice for the same benefit of being registered for 1991" (13-15). This, said the court, was a taking of their "property for 1991 without just compensation" (14). The Supreme Court also held that § 280 violated the contract clause of the United States Constitution. The court initially concluded that "[t]he statutory registration process which consists of the issuance of [registration] certificates in exchange for a fee" gives rise "by implication" to "a contractual relation between the state and licensed physicians" (16). In the court's view, § 280 substantially impaired physicians' statutorily-created "contractual" rights in their registrations because it "altered the terms" of those registrations "by reducing the state's obligation to physicians for an entire year" (17). The State Supreme Court declared § 280 "unconstitutional and void, as applied to the triennial registration of physicians ending in 1991," and required defendants "to refund all registration renewal fees paid pursuant to [§ 280 and] applicable to the 1991 calendar year" (8).

Defendants duly appealed from the order and judgment embodying the State Supreme Court's decision (2). On May 28, 1993, the Appellate Division, Third Department issued an opinion and order reversing the Supreme Court's decision, granting summary judgement to defendants and declaring that 1990 NY Laws, ch 190, § 280 had not been shown to be unconstitutional (A-2).[2] Dealing first with plaintiffs' claim that the challenged legislation impaired their contractual rights, the Appellate Division noted that "[i]t is black letter law that absent some clear indication that

[2]Parenthetical citations preceded by "A" are to the Appendix to the petition herein.

the Legislature intends to bind the State contractually, a statute is presumed not to create private contractual or vested rights, but merely to declare a policy to be pursued until the Legislature shall ordain otherwise" (A3-4). Moreover, said the court, "it is well settled that before a law may be deemed to be a contract between the State and a third party * * *, examination of the statutory language must show it to be plain and susceptible of no other reasonable construction than that a contract was created" (A4).

The Appellate Division concluded that the statute did not create contractual rights on behalf of plaintiffs. As the court noted, the practice of medicine in New York State "is comprehensively and pervasively regulated" as a matter of public policy, with the challenged fee structure "merely one measure of governing the conduct of this heavily regulated business" (A5). The legislation at issue was, the court said, "clearly general in scope based upon public policy considerations and cannot be interpreted to manifest a legislative intent to create private rights of a contractual nature enforceable against the State" (A5).

The Appellate Division next rejected plaintiffs' contention that the challenged statute effected an unconstitutional taking of physicians' property. The court noted that, while "a medical license is a valuable property right" and "a valid registration is necessary to use a medical license," the registration "is ministerial and financial in nature" (A5-6). The court thus found "that there is no property right in the duration of the registration" (A6).

Moreover, the Appellate Division added, to the extent the statute "affects the underlying medical licenses, it effects no taking" (A6). The court summarized the "principal factors"

in determining whether an unconstitutional taking has occurred as "(1) the economic impact of the regulations on the party claiming a taking, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action" (A6). Recognizing both "the limited financial impact [of the challenged statute] on the overall practice of medicine" and "the de minimis effort involved in the reregistration process," the Appellate Division held that the statute "has, at best, only a remote effect upon, or interference with, the ability of doctors to fully utilize their medical licenses" (A6). In addition, said the court, the revenue raised by the change in the registration scheme returns to the medical profession, for it "is used in policing the quality of medical care within the State, the heavily regulated business interest from which the revenue is raised" (A7).

Plaintiffs attempted to appeal as of right to the New York Court of Appeals, which on October 19, 1993 dismissed the appeal *sua sponte* "upon the ground that no substantial constitutional question is directly involved" (A1). Plaintiffs then moved for reconsideration of that dismissal and for leave to appeal to the Court of Appeals. These motions were denied on January 18, 1994 (A22).

REASONS FOR DENYING THE WRIT

I.

As the court below correctly concluded, the challenged Legislation does not effect an unconstitutional taking of physicians' property.

Despite plaintiffs' hyperbolic argument to the contrary, the legislation they challenge did not effect an unconstitu-

tional taking of physicians' property. The Appellate Division correctly held both that physicians had no property right in the terms of their registrations *per se*, and that the minimal effect of section 280 on licenses to practice medicine does not rise to the level of a "taking." Both conclusions are unexceptionable and require no review by this Court.

Plaintiffs first affect to believe (Pet, pp 16-21) that "the potential effect" of this case is to threaten "any governmental license, permit or franchise." The parade of horribles they marshall in support of this abstract proposition marches so breathlessly from Richard A. Epstein to Creedence Clearwater Revival that it never pauses to examine what actually occurred *in this case*. The legislation in question does not involve the "right" to practice medicine in New York. It effects no more than a slight change in the marginal cost of a physician's registration. When physicians registered for a triennial term commencing in 1989, they paid a total of $220 for their registrations, or roughly $73 per year. With the shift to a biennial registration period beginning with 1991, they paid $330, or $165 per year. This case thus involves no more than a $92 increase in the cost of physicians' registrations for 1991. Imposing this small increase in cost on the privilege of practicing medicine in New York does not affect the availability of professional registration or any other identifiable "property" interest physicians have. And indeed, plaintiffs have not alleged that any physician in New York could not pay the increased fee.

Moreover, a physician's failure to pay this additional fee does not result in a "taking" of his or her license or registration. The only penalty invariably imposed on "[a]ny licensee who fails to register by the beginning of the appro-

priate registration period" is the obligation "to pay an additional fee for late filing of ten dollars for each month that registration has been delayed while such licensee continue[s] to practice his profession." NY Educ. Law § 6502(3) (McKinney 1985). The New York Legislature obviously contemplated that a physician who inadvertently failed to register would continue to practice medicine for a time, even without a valid registration. It is true that, as plaintiffs note (Pet, pp 6-7), "willfully failing to register" is elsewhere defined by law as "professional misconduct" subjecting physicians to penalties including censure, suspension, revocation or annulment of license, and a fine of no more than $10,000. NY Educ. Law § 6530(12) (McKinney 1985); NY Pub. Health Law § 230-a (McKinney 1993). But any penalty must follow a finding by the state board for professional misconduct that the physician in question is guilty of professional misconduct, NY Pub. Health Law § 230-a (McKinney 1993), and such a finding of guilt can occur only after an elaborate set of mandated proceedings, including a formal investigation, a full hearing before a committee on professional conduct, and (at the physician's option) review of the committee's determination by an administrative review board. *See*, NY Pub. Health Law § 230(10) (McKinney 1993). The only certain consequence of a failure to comply with the new registration scheme is the eventual imposition of a $92 additional fee for 1991 plus a minimal monthly late fee. The actual "invasion of [physicians'] licenses and registrations" that plaintiffs purport to fear (Pet, p 21) is remote and speculative. Even more remote is "the potential effect" of this case on the licenses and registrations of others not before the Court. This case, as the Appellate Division understood and New York's highest court—which did not even deem plaintiffs' claims sufficiently substantial to warrant its review—affirmed, is not

about a "threat to freedom" (Pet, p 18). It is about nothing more than a State legislature's power to increase the cost of a single year of a physician's registration from $73 to $165. There is no reason for this Court to review the case in order to arrive at the inevitable and unexceptionable conclusion that the exercise of this power is not unconstitutional.

Nor does the Appellate Division's conclusion that physicians have "no property right in the duration of the registration" require this Court's review. Plaintiffs would have this Court grant certiorari to determine whether, when a licensed professional "has a property interest in his or her license but is required to register in order to use the license, the protection of the Takings and Due Process Clauses extends to the registration as well as to the license" (Pet, pp 26-27). The Appellate Division's decision, however, makes an answer to this question unnecessary. What this case is about, both sides concede, is the imposition of a small additional cost on the practice of medicine in New York State. Whether that cost is connected with licenses, registrations or anything else is immaterial. Evidently recognizing this, the Appellate Division assumed *arguendo* that the challenged legislation "affects the underlying medical licenses"—that is, that the increase in the cost of registrations had some effect on an acknowledged property right—and asked whether that effect rose to the level of an unconstitutional "taking." The court's conclusion in the negative was plainly correct and requires no further review.

The Appellate Division applied the same approach taken by this Court in analyzing any takings claim under the Fifth Amendment of the United States Constitution. According to this Court, the three factors which have "'particular significance'" in "identifying a 'taking' forbidden by the Fifth

Amendment" are " '(1) the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " *Connolly v Pension Benefit Guaranty Corp.*, 475 US 211, 224-25 (1986) (*quoting Penn Central Transportation Co. v New York City*, 438 US 104, 124 [1978]). All three factors, as the Appellate Division saw, weigh in favor of the legislation. The economic impact of a regulation must be "so substantial as to constitute a taking under our precedents." *Bowen v Gilliard*, 483 US 587, 607 (1987). If the economic impact of a statute renders the activity covered by the statute "commercially impracticable," *Keystone Bituminous Coal Assn. v DeBenedictis*, 480 US 470, 493 (1987), or deprives a property owner of the " 'economically viable use' " of his property, *Nolan v California Coastal Commission*, 483 US 825, 834 (1987) (*quoting Agins v Tiburon*, 447 US 255, 260 [1980]), the taking is of constitutional proportions. In the present case, however, the challenged legislation effects no more than a slight change in the cost of registration. It does not otherwise alter the conditions of the licensing or registration of physicians, does not prevent any physician from practicing medicine because he or she cannot pay the increased fee, and certainly did not render the practice of medicine in New York during 1991 economically "impracticable" or less than "viable." Plaintiffs do not and dare not suggest that an additional $92 charge for the privilege of practicing medicine in New York causes an economic impact on physicians sufficiently substantial to amount to a "taking." Nor can they argue colorably that this increase "has interfered with distinct investment-backed expectations" to a constitutionally-cognizable extent.

The slight increase in fees for 1991 is likewise not governmental action of a "nature" or "character" that constitutes a taking. There was of course no physical seizure of physicians' property in this case, but only an adjustment of "the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 US at 125. The small increase in the cost of registration that results from the legislation is simply a balancing of physicians' interests with New York's "legitimate interest in maintaining the quality of medical care within its borders." *Bigelow v Virginia*, 425 US 809, 827 (1975). Physicians' registrations fees are not commingled with other state revenues. Rather, they fund the Office of Professional Medical Conduct, which carries out the administrative, investigatory and legal functions of the State Board of Professional Medical Conduct, which in turn is charged with dealing with "matters of professional misconduct" in the medical profession. Physicians' registration fees thus serve an important public purpose. The increase in fees directly strengthens New York's ability to monitor medical misconduct. As this Court has noted, " '[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.' " *Connolly*, 475 US at 227 (*quoting FHA v The Darlington, Inc.*, 358 US 84, 91 [1958]). Similarly, plaintiffs cannot properly object that, given the "character" of the challenged legislation, which does little more than impose a small additional cost on the very profession to whose regulation these additional funds will be devoted, the slight effect on physicians' property rights amounts to an unconstitutional taking of those rights.

The distinction between a license and a registration, and a calibration of the property rights attendant upon one or the

other, is thus unnecessary for a resolution of this case on the merits. Assuming *arguendo*, as the Appellate Division did, that increasing the cost of physicians' registrations by $92 interferes to some extent with the ability to practice medicine in New York, the only question that need be asked is whether that interference rises to the level of an unconstitutional taking. There is no need for this Court to do as plaintiffs urge and "clarify" whether physicians have an independent property right in their registrations, for the outcome of the case remains the same regardless of how that issue is resolved.

II.

The question of whether the contract clause applies to implied contracts has already been resolved and requires no further examination by this court.

There is no reason for this Court to grant certiorari, as plaintiffs urge (Pet, pp 27-30), in order "to clarify whether the contract clause applies to implied contracts between the State and it subjects." First, that issue has been settled for more than sixty years. *See, Mississippi ex rel. Robertson v Miller*, 276 US 174, 179 (1928) (protection of Contract Clause extends to implied contracts "just as it does to those specifically expressed"). Moreover, contracts created by statute between a State and its citizens are virtually always "implied." Courts dealing with Contract Clause claims examine statutes not for the formal properties of contracts, but rather for " 'an adequate expression of an actual intent' of the State to bind itself." *National Railroad Passenger Corp. v Atchison, Topeka & Santa Fe Ry. Co.*, 470 US 451, 466-67 (1985) (*quoting Wisconsin & Michigan Ry. Co. v Powers*, 191 US 379, 386-87 [1903]). When courts find that statu-

tory language creates a contractual right, it is because the contract can be inferred from that language. *See, e.g., Indiana ex rel. Anderson v Brand*, 303 US 95, 100 (1938).

The criteria by which courts may determine whether statutory language implies a contractual obligation by which a State is bound are well established. On the one hand, if a statute evinces an intent of the State to bind itself, it creates or contains a contract. On the other hand, in the absence of a clear expression of such actual intent, the presumption is that the statute "is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v Board of Educ.*, 302 US 74, 79 (1937). The Appellate Division simply applied these well-established principles to the facts of the case at hand, correctly concluding that "[t]he statutes in question are clearly general in scope based upon public policy considerations and cannot be interpreted to manifest a legislative intent to create private rights of a contractual nature enforceable against the State." Plaintiffs do not challenge this decision on its own terms, instead urging that this Court review the case to "clarify" a matter that has been clear for decades. Contracts created by state statute are almost always "implied"; the question in any given case is whether the particular statute at issue implies a contract. The Appellate Division held that the New York statutes dealing with physicians' registrations did not create contractual rights. New York's highest court held that plaintiff's constitutional argument was not "substantial" enough to warrant further judicial review, let alone reversal. Plaintiffs offer no reason for this Court to consider the matter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
May 13, 1994

Respectfully submitted,
G. OLIVER KOPPELL
Attorney General of the State of New York
Attorney for Respondents
The Capitol
Albany, NY 12224
(518) 473-0903

JERRY BOONE
Solicitor General and Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General
of Counsel